(2)

NO. 88-44

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

CHILD, INC.

Petitioner

v.

TEXAS EMPLOYMENT COMMISSION

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

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August 5, 1988
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QUESTION PRESENTED FOR REVIEW

Whether, with regard to projects funded under the Head Start Act, petitioner is entitled to classification as an educational institution within the meaning of 3304(a)(6)(A) of the Federal Unemployment Tax Act as a matter of law.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Texas Employment Commission, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking a review of the judgment and opinion of the Court of Appeals, Third Supreme Judicial District of Texas, at Austin. That opinion is reported at *Texas Employment Commission vs. Child, Inc.*, 738 S.W.2d 56 (Tex.Civ.App. - Austin, 1987, writ ref'd.)

JURISDICTION

I. The Court should not take jurisdiction because Petitioner is seeking review of the judgment of a state court in which no federal question was raised. Although required by Supreme Court Rule 21(a), Petitioner's statement of the case does not specify the stage in the proceeding at which the federal question sought to be reviewed was raised, nor does it specify the method or manner of raising it and the way in which it was passed upon by the court. This glaring noncompliance with the rule is necessitated by the

simple fact that the Court of Appeals of Texas did not rule on a federal question because none was presented. Moreover, in later proceedings neither Petitioner's Motion for Rehearing (Appendix A) nor Application For Writ of Error (Appendix B) presented the state supreme court with a federal question.

It is axiomatic that the Court will not review a state court judgment based upon solely state grounds.

II. Alternatively, if the Court finds that a federal question has been properly presented it should still not take jurisdiction because the state court judgment is based upon a non-federal ground, and the non-federal ground is adequate to support the state court judgment. *Murdock vs. Memphis*, 20 Wall. 590,636; *Berra College vs. Kentucky*, 211 U.S. 45,53; *Fox Film Corp. vs. Muller*, 296 U.S. 207. The state court decision was based entirely on state law; specifically, the existence of substantial evidence to support the administrative decision of the Texas Employment Commission. The operation of the substantial evidence rule as it applies to decisions of the Texas Employment Commission is a well settled area of law in Texas, and therefore is clearly adequate to support the state court judgment. *Mercer vs. Ross*, 701 S.W.2d 830 (Tex. 1986).

REASONS FOR DENYING THE WRIT

THERE IS NO CONFLICT IN THE DECISIONS.

Petitioner alleges a conflict between state decisions of the various states and federal law regarding what constitutes an "educational institution." However, Petitioner admits in its brief that nowhere in applicable federal law, that is to say 26 U.S.C.§§3301-3311, nor in 42 U.S.C. §§ 9831-9852, is the term

"educational institution" defined. (Petition for Writ P.11) There is no federal law directing the various states to adhere to a specific definition of "educational institution."

The Federal Unemployment Tax Act, codified at 26 U.S.C. §3301-3311 recites only minimum guidelines for the various states to adhere to in order to receive administrative funding from the federal government. It therefore clearly contemplates diversity among the states in all nonspecifically regulated areas. The various states are free to adopt a definition of "educational institution" or to refrain from doing so. *Alexander vs. Employment Security Department of State*, 38 Wash.App. 609; 688 P2d 516, 523 (1984).

The language creating Head Start programs, specifically 42 U.S.C. 9831(a), fails to designate it as a specific educational institution, and indeed contains other objectives such as health, nutrition, social and other services. Not all programs are operated exactly the same. *In Re Huntley*, 42 N.C.App. 1, 255 S.E.2d 574, 575 (1975).

Given the very flexible and broad language contained in these federal statutes, it is inconceivable that either could be construed as dictating a specific course of action to be followed by the various states. Also persuasive is the fact that in each state case mentioned by Petitioner in its brief, the courts' decision was based on state law. *Alexander v. Employment Security Department of State, supra*; *In re Huntley, supra*; *Industrial Commission of State v. Board of County Commissioners of Adams*, 690 P.2d 839 (Colo. 1984); *Simpson v. Iowa Department. of Job Services*, 327 N.W.2D 775 (Iowa Ct.App. 1979).

PETITIONER HAS NOT DEMONSTRATED THAT THE QUESTION IS IMPORTANT.

In the eleven years since the challenged statute (Tex. Lab. Code Ann. art. 5221b-l[f]) became affective, January 1, 1978, this is the only case to reach the appellate courts. Surely other Head Start programs are affected; however, Petitioner has not shown what effect the challenged statute has or what other persons might be affected by a decisicn in this case.

CONCLUSION

For these reasons, and for the reasons stated in the opinion below, the Application For Writ of Certiorari should be denied.

Respectfully submitted,

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MARY F. KELLER
First Assistant Attorney General

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August 5, 1988
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APPENDIX A

NO. 3-86-115-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

* *

TEXAS EMPLOYMENT COMMISSION,
Appellant

V.

CHILD, INC.,
Appellee

* *

APPELLEE'S MOTION FOR REHEARING

* *

The Opinion and Judgment of this Court issued September 23, 1987, should be reconsidered, and the matter reheard, on the following grounds:

MOTION FOR REHEARING - POINT NUMBER ONE

THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THIS COURT HAS ERRED IN ITS UNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

MOTION FOR REHEARING - POINT NUMBER TWO

THIS HONORABLE COURT HAS RULED INCORRECTLY, BECAUSE ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE THAT MUST BE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED BECAUSE APPELLANT REQUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

MOTION FOR REHEARING - POINT NUMBER THREE

ALTHOUGH THIS HONORABLE COURT INCORRECTLY EQUATED CHILD, INC. WITH ITS PROJECT HEAD START COMPONENT (CHILD, INC. CONCLUSIVELY PROVED IT WAS AN EDUCATIONAL INSTITUTION WHICH, AMONG A GREAT MANY OTHER ACTIVITIES, RUNS A DESIGNATED PROJECT HEAD START AGENCY), THIS COURT SHOULD RULE AS A MATTER OF LAW THAT A DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

MOTION FOR REHEARING - POINT NUMBER FOUR

THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THIS COURT ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT.

MOTION FOR REHEARING - POINT NUMBER ONE RESTATED .

THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THIS COURT HAS ERRED IN ITS UNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

This Court, in reversing and rendering the judgment of the Trial Court, appears to have applied the "substantial evidence" rule incorrectly. Under *Mercer v. Ross*, 701 S.W.2d 830, at 831 (Tex. 1986) the Supreme Court offered the following instructive language.

> Appellate review of a TEC decision is provided for under Tex.Rev.Civ.Stat.Ann. Art 5221B--4(i) (Vernon 1971), which requires a trial de novo with substantial evidence review. TEC is specifically excluded from the Administrative Procedure and Texas Register Act, Tex.Rev. Civ.Stat.Ann.art. 6252-13a Subsection 21(g) (Vernon Supp.1985). A trial de novo review of a TEC ruling required the court to

> determine whether there is substantial evidence to support the ruling of the agency, *but the reviewing court must look to the evidence presented in trial and not the record created by that agency* (emphasis provided).

This Honorable Court's Opinion incorrectly relies upon the Findings of Fact by the Commission and the Commission's conclusions drawn from its findings. Under Mercer, the record created by the Agency is not to be looked at by either the Trial Court or by this Honorable Court. The Trial Court correctly reviewed the evidence that was presented to it. The trial evidence which Appellant cited as supporting TEC's decision that Child, Inc. was not an educational institution was not evidence inconsistent with the overwhelming evidence that Child, Inc. is an educational institution. In other words, for Child, Inc. to deliver early childhood development services under a Head Start program is not inconsistent with Child, Inc. being an educational institution. The administrative decision was not supported by substantial evidence adduced at the trial and in fact is supported by no evidence adduced at the trial.

MOTION FOR REHEARING - POINT NUMBER TWO RESTATED

> THIS HONORABLE COURT HAS RULED INCORRECTLY, BECAUSE ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE THAT MUST BE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED BECAUSE APPELLANT RE-

QUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

Under *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977) if there is evidence which supports implied Findings of Fact favoring the judgment on any legal theory the judgment will be upheld. Here, TEC requested no Findings of Fact or Conclusions of Law from the Trial Court, and all cases hold that every presumption will be indulged in favor of the Trial Court's judgment. The evidence before the Trial Court that Child, Inc. is an educational institution included the following:

A. Child, Inc. was organized exclusively for public charity and *strictly educational* purpose (emphasis provided);

B. Child, Inc. was granted an exemption from the Texas Sales Tax as *an educational organization* (emphasis provided);

C. Child, Inc. delivers educational development for children, staff training for supervisors of small children, and the training and education of parents;

B. Child, Inc. was granted an exemption from the Texas Sales Tax as an educational organization (emphasis provided);

C. Child, Inc. delivers educational development for children, staff training for

supervisors of small children, and the training and education of parents;

D. Child, Inc. is currently engaged in two nationally funded project, the first in conjunction with the University of Arizona to develop an activity guide for curriculum for programs which serve young children and the second a national project to develop methods of training those who work with and provide educational services to young children;

E. Child, Inc. has provided cooperative laboratory schools on the campus of the University of Texas in the past and at the time of the trial operated a cooperative laboratory school with Austin Community College; and

F. Child, Inc. runs *the largest vocational training program* that has ever existed in Travis County (emphasis provided).

At page 2 of this Honorable Court's Opinion, this Court has stated that Child, Inc. does not provide jobs for any of its employees during the three months of each year falling between the nine month academic terms. There is no evidence in the record to support that conclusion. It is only in Child, Inc.'s Project Head Start component that jobs are not provided for employees during the three months falling between the nine month academic terms.

MOTION FOR REHEARING - POINT NUMBER THREE RESTATED

ALTHOUGH THIS HONORABLE COURT INCORRECTLY EQUATED CHILD, INC. WITH ITS PROJECT HEAD START

COMPONENT (CHILD, INC. CONCLUSIVELY PROVED IT WAS AN EDUCATIONAL INSTITUTION WHICH, AMONG A GREAT MANY OTHER ACTIVITIES, RUNS A DESIGNATED PROJECT HEAD START AGENCY), THIS COURT SHOULD RULE AS A MATTER OF LAW THAT A DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

The statutory framework of the Head Start programs is set out at 42 USC Section 9831 through 9851. At Section 9831(a) we read the statement of purpose and policy of Head Start programs.

> In recognition of the role which Project Head Start has played in the effective delivery of comprehensive health, educational, nutritional, social, and other services to economically disadvantaged children and their families it is the purpose of this subchapter to extend the authority for the appropriation of funds for such program.

Notice that Congress has recognized the educational services that Project Head Start has delivered to disadvantaged children and their families as a matter of law.

In Section 9836, the Secretary of Health and Human Services is authorized to designate as a Head Start Agency any local, public or private non-profit agency which has the power and authority to carry out the purposes of the Subchapter and is determined to be

capable of planning, conducting, administrating, and evaluating a Head Start program. At Section 9833, the Secretary of Health and Human Services is authorized to grant to a designated agency funds to promote

> a Head Start program focused primarily upon children from low income families who *have not reached the age of compulsory school attendance which (1) will provide such comprehensive* health, nutritional, *educational*, social and other *services* as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction on the local level (emphasis provided).

As a matter of law, the United States Congress has funded Head Start to provide educational services for pre-school children who have not reached the age of compulsory school attendance. This Court makes mockery of the Federal Statute when it relies on the age of the children as any evidence at all that they are not capable of being educated; or that no institution serving their needs is "educational." The better reasoning is found in *Simpson v. Iowa Department of Job Service*, 327 N.W.2d 775, where the Court said the following:

> The record reflects that there are four components to the Head Start program at issue here: a health component; parental involvement component; social services component; and education component. The educational component involves the teaching the language, speaking, and self expression. The Head Start participants

> are oriented toward preparation toward the public school system. Additionally, the parents of Head Start children are educated in nutrition and child care. Admittedly, there are elements of the Head Start Program which could not be considered academic , but which we believe are sufficient indicia of academic training to warrant a finding consistent with (the Iowa Employment Security Law).

The Iowa Court cited a North Carolina case in support of its position and concluded by saying:

> We agree with the District Court's conclusion that Head Start is an educational institution within the meaning of Section 96.19(37) and that as such petitioners are barred from unemployment compensation since they had reasonable assurance of re-employment in the next successive academic term in a similar capacity.

MOTION FOR REHEARING - POINT NUMBER FOUR RESTATED

> THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THIS COURT ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT.

With all due respect, this Honorable Court appears to have ignored the substantial evidence rule in trial de novo cases, it appears to have ignored the evidence adduced before the Trial Court and the failure of TEC to request Findings of Fact and Conclusions of

Law; it seems to have equated Child, Inc. with its Head Start Program; and it has definitely determined that Project Head Start agencies cannot be educational institutions based on the delivery of Project Head Start services. The last determination seems to fly in the face of federal statute and appellate decisions from Iowa and North Carolina. This Honorable Court should withdraw its Opinion and affirm the Judgment of the Trial Court.

Respectfully submitted,

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BY:_____
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ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

By my signature above, I do hereby certify to the Court that a true and correct copy of the foregoing document has been forwarded by ___ hand delivery; ___ certified mail, return receipt requested, to Ms. Susan F. Eley, P.O. Box 12548, Austin, Texas 78711-2548 this the 8th day of October, 1987.

NO. _____

IN THE SUPREME COURT OF TEXAS
AT AUSTIN

CHILD, INC.,
Petitioner

V.

TEXAS EMPLOYMENT COMMISSION,
Respondent

PETITIONER'S APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Child, Inc. presents this Application for Writ of Error and respectfully shows this Court the following matters.

CERTIFICATE OF PARTIES

Pursuant to Tex. R. App. Proc. 131(a) Petitioner respectfully calls the Court's attention to the parties involved in this appeal and their respective interest so that the members of the Court may at once determine whether they are disqualified to serve or should excuse themselves from participation in the decision of this case.

A. Child, Inc., which was the Plaintiff in the Trial Court and the Appellee in the Austin Court of Appeals, a Travis County, Texas, non-profit corporation

exempt from Texas sales tax as an educational organization, is the Petitioner.

B. The Texas Employment Commission was Defendant in trial and Appellant in the Court of Appeals, and is the Respondent here.

PRELIMINARY STATEMENT

Among other activities, Child, Inc. operates a Project Head Start program pursuant to 42 U.S.C. Sections 9831 through 9851. Project Head Start is funded for nine month academic terms but not for the three summer months. Child, Inc.'s Head Start employees do not work during the three summer months between terms. Are they entitled to unemployment compensation? TEC ruled that they are. The Trial Court ruled that Child, Inc. is an educational institution for the purpose of the Texas Unemployment Compensation Act and reversed the TEC ruling. The Austin Court of Appeals reversed the Trial Court, relying heavily on the record before the Commission. Child, Inc. has applied for this Writ of Error and seeks to reverse the Judgment of the Austin Court of Appeals and reinstate the Trial Court's Judgment.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this Appeal under the provisions of V.T.C.A. Government Code Sections 22.001(a)(2) and (a)(6).

POINTS OF ERROR

POINT OF ERROR NUMBER ONE

THE AUSTIN COURT OF APPEALS RULED INCORRECTLY, BECAUSE

ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED SINCE RESPONDENT REQUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THAT JUDGMENT BASED ON ITS MISUNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

POINT OF ERROR NUMBER THREE

THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT BY USING THE SAME ARBITRARY AND CAPRICIOUS ILLOGIC AS THE COMMISSION.

POINT OF ERROR NUMBER FOUR

THE TEXAS SUPREME COURT SHOULD RULE AS A MATTER OF LAW THAT A DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

STATEMENT OF FACTS IN SUPPORT OF ALL POINTS

This highly unusual case presents both a substantive issue of first impression and a procedural issue of first impression in Texas. Among other activities, Child, Inc. operates all of the Project Head Start early childhood development centers in Travis County, Texas. Project Head Start is funded for nine months each year by the Federal Government, coincident with the school year. Are Head Start employees entitled to collect unemployment benefits for the summer months between academic terms In the past, TEC determined that Head Start employees who were employed by Head Start Programs operated by public schools could not collect unemployment benefits for the summer months. TEC also determined that Head Start programs operated by "Community Action Agencies" were not educational institutions and would have to be taxed to pay unemployment benefits for the employees not working during the summer. Child, Inc. is neither a public school nor a Community Action Agency. It is a non-profit corporation organized for educational purposes and exempt from Federal and State taxes as an educational organization. TEC determined that Child, Inc. was not an educational institution and its Head Start employees could collect unemployment benefits during the summer vacation.

The Trial Court reversed TEC, judging that Child, Inc. was an "educational institution" as that term is understood in the Texas Unemployment Compensation Act. The Austin Court of Appeals, citing the "substantial evidence" rule, *proceeded to detail the findings of fact by the Commission and its conclusions based on its findings* (pages 5 and 6 of the Opinion) rather than deal with the evidence adduced at trial, and reversed the Trial Court. While the Austin Court of Appeals erroneous application of the "substantial evidence" rule rather than the substantial evidence with trial de novo review rule requires reversal, there are two questions of first impression that are raised. First, in the procedural context, the substantial evidence with trial de novo review rule is in effect for TEC appeals. The reviewing Court must look to the evidence presented *in trial* and not to the record created by the Agency. Here the Agency has failed to request Findings of Fact or Conclusions of Law from the Trial Court, and the Agency should be preduded from complaining about the Judgment of the Trial Court, under *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977), if there is any evidence which supports implied Findings of Fact favoring the Judgment on any legal theory. In other words, it would seem that the substantial evidence rule, in the trial de novo context, becomes irrelevant in the face of a violation of the mandate of Texas Rules of Civil Procedure 296-299 This interplay of issues has not, apparently, been spoken to by a Texas court.

The substantive issue concerns the nature of Project Head Start. Three other states have dealt with the issue of whether a Project Head Start program in and of itself is "educational" under the pattern unemployment compensation statutes. Iowa and North Carolina have determined that Project Head Starts are per se "educational institutions." Colorado has taken a

different course and determined that Project Head Start must be delivered by a public school to be considered an "educational institution." TEC would adopt the Colorado approach. No Texas court has faced this question and Texas will be the fourth state, and the largest state, to have dealt with it.

The Colorado approach is costly to the children in the programs, because the funding of Project Head Start by the Federal Government will not allow for an increase to "cover" the unemployment tax during the mandatory unfunded period of the program, summer vacation. As a result, fewer children can be

POINT OF ERROR NUMBER ONE RESTATED

THE AUSTIN COURT OF APPEALS RULED INCORRECTLY, BECAUSE ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED SINCE RESPONDENT REQUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

According to *Mercer v. Ross*, 701 S.W.2d 830, at 831 (Tex. 1986), Appellate review of a TEC decision is by trial de novo. The Trial Court is required to determine whether there is substantial evidence to support the ruling of the Agency, but the reviewing Court must look to the evidence presented in trial and

not the record created by that Agency. The record to be dealt with is not the Agency record but the trial record. Where TEC requested no Findings of Fact or Conclusions of Law from the Trial Court, the Trial Court's Judgment must be affirmed if the evidence before the Trial Court supports implied Findings of Fact favoring the Judgment. See *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609 at 613 (Tex. 1951), and *Lassiter v. Bliss,* 559 S.W.2d 353 (Tex. 1977).

The evidence clearly supported the Trial Court's Judgment. The controlling fact issue in this case is whether or not Child, Inc. is an "educational institution." Child, Inc. was organized exclusively for public charity and strictly educational purposes (SF 30, 1. 25 to SF 31, 1. 2, PX 1, TRX Vol. No. Pl). Child, Inc. was granted an exemption from the Texas sales tax as an educational institution (SF 33, 11. 12-13, PX 2, TRX Vol. No. P3). Testimony concerning Child, Inc.'s educational services was received throughout the trial. Child, Inc. is engaged in three basic functions in the areas of education and training; these are educational development for children, staff training for supervisors of small children, and the training and education of parents. Child, Inc. is currently engaged in two nationally funded projects, the first in conjunction with the University of Arizona to develop an activity guide for curriculum for programs that serve young children, and the second, a national project to develop methods of training those who work with and provide educational services to young children (SF 33, 1. 16 to SF 34, 1. 5). Child, Inc. has provided cooperative laboratory schools on the campus of the University of Texas in the past and at the time of the trial operated a cooperative laboratory school with Austin Community College (SF34, 11. 8-20). Child, Inc. runs the largest vocational training program that has ever existed in Travis County. SF 84, 11. 21-24. One of the

Defendants, Shirley Brown, who testified in this case, had no quarrel with Mr. Strickland and agreed that vocational education is a big responsibility of Child, Inc. SF 12, 11. 16-19. It is clear the judgment below was supported by the evidence.

POINT OF ERROR NUMBER TWO RESTATED

> THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THAT JUDGMENT BASED ON ITS MISUNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

No substantial evidence was presented that Child, Inc. is not an educational institution. Child, Inc.'s Head Start Program is an early childhood development program and its curriculum cannot be dismissed as mere "daycare." Its curriculum is appropriate for pre-school children (see Plaintiff's Exhibit Number 4, TR Exhibit Volume P4). However, it was inappropriate for TEC to blind itself to the other activities of Child, Inc., just as it was improper for the Austin Court of Appeals to do. The Austin Court of Appeals wrote an Opinion which effectively stated that all of Child, Inc.'s (approximately two hundred) employees were Head Start employees, when in fact, Project Head Start is only part of Child, Inc.'s activities and there were only fifteen applicants in this case. The Austin Court of Appeals adopted the Commission's findings and conclusions in its Opinion, which is wholly inappropriate under Mercer v. Ross.

POINT OF ERROR NUMBER THREE RESTATED

THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT BY USING THE SAME ARBITRARY AND CAPRICIOUS ILLOGIC AS THE COMMISSION.

The Austin Court of Appeals' decision is arbitrary and capricious because of its illogic. The record below, as detailed in the argument under Point of Error Number One, sets forth many activities which are unique to an educational institution. It also sets forth activities that are cited by the Court of Appeals at pages 5 and 6 of its Opinion. Within the Project Head Start Program, pre-schools are operated, the teachers are not licensed school teachers, the children are pre-school age, and the focus of the program is to provide low income children with basic learning skills and socialization necessary to function as well in the regular school system as children of higher income families. While these services might be available outside of an educational institution, *they are not inconsistent with the cooperation of an educational institution and are therefore no evidence whatsoever that Child. Inc. is not an educational institution.* The Court of Appeals' Opinion and the Commission's ruling were arbitrary and capricious and the Judgment of the Trial Court was correct.

POINT OF ERROR NUMBER FOUR RESTATED

THE TEXAS SUPREME COURT SHOULD RULE AS A MATTER OF LAW THAT A

DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

The statutory framework of the Head Start programs is set out at 42 U.S.C. Sections 9831 through 9851. In Section 9831(a) the purpose and policy of Head Start programs is stated.

> In recognition of the role which Project Head Start has played in the effective delivery of comprehensive health, educational, nutritional, social and other services to economically disadvantaged children and their families it is the purpose of this subchapter to extend the authority for the appropriation of funds for such program.

Notice that Congress has recognized the *educational* services that Project Head Start has delivered to disadvantaged children *and their families* as a matter of law.

In Section 9836, the Secretary of Health and Human Services is authorized to designate, as a Head Start Agency, any local, public or private non-profit agency which has the power and authority to carry out the purposes of the subchapter and is determined to be capable of planning, conducting, administrating, and evaluating a Head Start Program. In Section 9833, the Secretary of Health and Human Services is authorized to grant to a designated agency funds to promote

> a Head Start program focused primarily upon children from low income families who have not reached the age of compulsory

> school attendance which (1) will provide such comprehensive, health, nutritional, educational, social and other services as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction on the local level (emphasis provided).

As a matter of law the United States Congress has funded Head Start to provide educational services for pre-school children who have not reached the age of compulsory school attendance. This Austin Court of Appeals Opinion has made mockery of the Federal Statute when it relies on the age of the children as evidence that they are not capable of being educated; or as evidence that no institution serving their needs is "educational." The better reasoning is found in *Simpson v. Iowa Department of Job Service*, 327 N.W.2d 775, where the Court said the following:

> The record reflects that there are four components to here: a health the Head Start program at issue component; social component; parental involvement educational component. The services component; and involves the teaching the component The Head educational speaking, and self expression, preparation language, Start participants are oriented toward toward the public school system. Additionally, the parents of Head Start children are educated in nutrition and child care. Admittedly, there are elements of the Head Start Program which could not be considered academic, but which we believe are sufficient indicia of academic training to

> warrant a finding consistent with (the Iowa Employment Security Law).

The Iowa Court cited a North Carolina case in support of its position and concluded by saying:

> We agree with the District Court's conclusion that Head Start is an educational institution within the meaning of Section 96.19(37) and that such petitioners are barred from unemployment compensation since they had reasonable assurance of re-employment in the next successive academic term in a similar capacity.

CONCLUSION

The Austin Court of Appeals has blatantly disregarded and findings incorrectly cited *Mercer v. Ross* in adopting Commission and rulings. It ignored the evidence adduced before the Trial Court and it ignored the failure of TEC to follow Texas Rules of Inc. with Civil Procedure 296 through 299. It equated Child, capriciously ignored its Head Start Program and arbitrarily and capriciously ignored Child, Inc.'s institutional base to focus on one aspect of its services. That aspect is not inconsistent with the operation of an educational institution. The Austin Court of Appeals has effectively determined that Project Head Start agencies cannot be educational institutions simply based on the delivery of Project Head Start services, and that determination seems to fly in the face of Federal Statute and appellate decisions from Iowa the and North Carolina. Petitioner respectfully requests that Supreme Court of Texas grant Writ of Error in this case on all points, in the interest of justice and equity, and so that low income families and their children in Texas will not be ill served.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature above, I do hereby certify to the Court that a true and correct copy of the foregoing document has been forwarded by ___ hand delivery; ___ certified mail, return receipt requested, to Ms. Susan F. Eley, P.O. Box 12548, Austin, Texas 78711-2548 this the 20th day of November, 1987.